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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1483

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

JIMMIE L. RODGERS and JOHN A. TURNER,
Respondents,

HONORABLE HUBERT I. TEITELBAUM,
United States District Judge,
Nominal Respondent,

LOCAL 1397, AFL-CIO UNITED STEELWORKERS OF AMERICA; and THE UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Nominal Respondents.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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As fully set forth in the "Petition,"[1] in this case a majority opinion of the Third Circuit has invalidated Local Rule 34(d) of the Western District of Pennsylvania, which Rule provided for court supervision of communication with potential members of the alleged class in suits brought under F.R.Civ.P. 23. The Third

1. "Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit" (hereinafter "Petition") at 9-12.

Circuit struck down that Local Rule on the grounds that federal courts lack the statutory power to regulate such communication, at least in the pre-certification stage of an alleged class action.[2]

The Respondents (who were the Plaintiffs in the District Court and are herein referred to as "Plaintiffs") have filed a "Brief In Opposition To Certiorari" (hereinafter also "Brief Opp. Cert.") which consists of (a) legal arguments, in support of the Third Circuit's opinion, that are essentially based upon grounds other than those adopted by the Third Circuit and (b) factual arguments as to why Plaintiffs should have been permitted to communicate by the District Court on the facts of the instant case.

In all, Plaintiffs set forth six separate arguments urging denial of the Petition. Brief Opp. Cert. at 12-21. One of Plaintiffs' arguments is that the District Court's rulings conflicted with Title VII of the Civil Rights Act of 1964. Brief Opp. Cert. at 15. Two of Plaintiffs' arguments are based upon First Amendment considerations. Brief Opp. Cert. at 15-18. An additional argument is that Local Rule 34(d) is in conflict with F.R.Civ.P. 23. Brief Opp. Cert. 12-15. Plaintiffs last two arguments relate to the facts and circumstances of this case. Brief Opp. Cert. at 19-21. As will be discussed, *infra,* none of these arguments provide a basis for denial of the Petition.

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2. *Id.*

A. The Third Circuit's Opinion Was Not Dependent Upon The Fact That This Is A Title VII Suit.

Plaintiffs' argument regarding the policies of Title VII is, of course, not a basis for denial of this Petition, because the Third Circuit's opinion was in no way limited to class actions pursuant to Title VII.

B. The Constitutional Issues Raised By Respondents Were Not Ruled Upon By The Third Circuit And Would Require Briefing And Argument On The Merits Before Resolution By This Court.

Plaintiffs' arguments based upon the First Amendment should not provide a basis for this Court's denial of the Petition. The Third Circuit's opinion explicitly disavowed ruling upon the constitutional issues.[3] Further, as the very cases cited by Plaintiffs indicate,[4] the First Amendment is not an absolute bar to supervision of communications even in cases where the communications do not have an effect upon the judicial process such as is present here. Even in those cases where no effect upon the judicial process is involved, the resolution of First Amendment issues involves many very sophisticated judgments as well as a careful delineation of the scope of permissible regulation.[5] Since the Third Circuit did not rule upon these questions, we presume that this Court would not decide such constitutional matters without the full briefing and assistance of the parties on the merits, regarding the extent, if any, to which the First Amendment precludes court regulation

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3. Petition at 15, and App. A, at 22a, 23a, 28a n.18.

4. *E.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

5. *Id.*

of communications which would bear upon the class action process created by F.R.Civ.P. 23.[6]

In addition, it should be noted that the existence of First Amendment rights in this case is far from clear. The communications which Plaintiffs and their counsel desire to make to the potential members of the alleged Plaintiff class arise only by reason of the stature of Plaintiffs and their counsel created by F.R.Civ.P. 23. Accordingly, the federal courts should have the power to regulate Plaintiffs' and their counsel's use of that stature. Further, any regulation of speech involved herein operates under and by reason of "judicial superintendence"[7] not from a bureaucratic official acting as a censor, and accordingly allows for prompt judicial consideration of the competing interests of freedom of expression and prevention of abuse of the judicial process.[8]

Moreover, even if there were some constitutional invalidity with the present language of Local Rule 34(d), an opinion defining the scope of that invalidity, if any, would be vastly different than the opinion of the

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6. Petition at 24-27 discusses the numerous cases and authorities which have indicated that the First Amendment does not bar the courts from regulating communications where such regulation is needed to prevent abuse of the judicial process.

7. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The decision in *Sullivan* did not involve a court's additional powers to regulate communications which affect the judicial process.

8. In the instant case, the District Court promptly set hearings upon each request for communication made by Plaintiffs. Plaintiffs have not complained of the District Court's speed in granting such hearings, even though Plaintiffs have been dissatisfied with the Court's rulings upon certain of those requests.

Third Circuit which holds that the district courts lack all statutory power to regulate communications by attorneys with potential members of their alleged class, at least during the pre-certification stage of the suit. Therefore, even if the Court has some concern as to the constitutional issues raised in Plaintiffs' "Brief In Opposition To Certiorari," the appropriate course would be the grant of this Petition to settle these constitutional issues rather than to let stand a Third Circuit decision which does not decide them.

C. Neither Precedent Nor Logic Demonstrate Any Conflict Between Local Rule 34(d) And F.R.Civ.P.23.

Plaintiffs contend that Local Rule 34(d) is in conflict with F.R.Civ.P. 23. Brief Opp. Cert. 12-15. Plaintiffs cite no authority in support of that proposition other than the bare conclusion to that effect reflected in the majority opinion of the Third Circuit. The concurring opinion of Judge Weis disagreed with the majority and found that the regulation of class communications was not improper, although he would have required Local Rule 34(d) to be re-drafted to eliminate any overbreadth. If the majority opinion of the Third Circuit is permitted to stand, district courts in that Circuit will not be able to regulate communications by counsel with potential members of the alleged class, at least in the pre-certification stage of the suit—although in the other Circuits of the federal judicial system such power is both available and useful. Plaintiffs have offered no counter to the numerous cases cited in Petition at 18-21 which have recognized a district court's power to regulate class action communications. Plaintiffs have similarly offered no response to the discussion in the Petition at 21-23 of a recent congressional study and

the views of the Coordinating Committee for Multiple Litigation, which drafted the MANUAL FOR COMPLEX LITIGATION,[9] both of which acknowledge a district court's power under F.R.Civ.P. 23 to control such communications with potential class members.

The apparent premise of the Third Circuit's opinion is that there is not sufficient need to supervise communications with potential class members. A recent opinion of the United States Court of Appeals for the Fifth Circuit demonstrates both (a) the need for judicial supervision of class communications and (b) that, in fact, there was good reason for the Western District of Pennsylvania to seek to supervise the nature of the communications by these very counsel for Plaintiffs regarding the comparative injunctive relief and back pay available under the steel industry Consent Decrees[10] as opposed to that available in this *Rodgers* suit. The same attorneys, who here represent the Plaintiffs, argued to the Fifth Circuit, which was reviewing the Consent Decrees, that the amount of back pay and other relief available under the Consent Decrees was inadequate in comparison to the relief available to employees by way of contested litigation. In support of that argument, these attorneys discussed the recovery in the one action in the basic steel industry where back pay claims had been litigated and awarded (United States Steel Corporation's Fairfield Works case). The Fifth Circuit's opinion noted that the argument of counsel for Plaintiffs was "misleading" as to the nature of the Fairfield Works recovery.[11] The Fifth Circuit pointed out that the average award per claimant in the Fairfield case was actually $440 per claimant less than that available under the Consent Decrees—not the great sums suggested by the counsel for Plaintiffs. The Fifth Circuit noted how counsel for Plaintiffs had omitted mention of the fact that while 60 Fairfield Works employees recovered damages, 3,000 other employees were held not entitled to any back pay. The Fifth Circuit further commented upon Plaintiffs' (there the Appellants') arguments:

> "Without saying more about the Fairfield case, we may candidly observe that it is far from clear that any particular employee would be better off if he or she awaited contested litigation in lieu of accepting the back pay provided by the consent decrees. If the decrees were vacated, however, it *is* clear that litigation-free back pay would be lost to those whose claims were factually weak and, though arguably entitled to some back pay, probably could not otherwise recover. *See* F.R.Civ.P. 52(a) (findings made by a district judge may not be disturbed unless 'clearly erroneous'). In addition, the immediate industry-wide injunctive reforms—which benefit 60,000 minority and female steelworkers—would likely evaporate, at least until after years of trials and appeals. Absent a much stronger showing than this, it would plainly be irresponsible for us to assume that the vast majority of affected employees would be persuaded by appellants' gratui-

9. 1 J. MOORE, FEDERAL PRACTICE (Part 2, 1973).

10. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 11 BNA FEP CAS. 167 (5th Cir. 1975).

11. The Fifth Circuit stated: "Moreover, to the extent appellants contend that the average claimant's recovery in Fairfield exceeded the average award under the consent decrees, their argument is misleading." 517 F.2d 863, 11 BNA FEP CAS. 196.

tous advice, or that such advice is rendered in those employees' best interests." (Footnote omitted) 517 F.2d 863, 11 BNA FEP CAS. 196-197.

If the counsel for Plaintiffs will present to the Fifth Circuit figures concerning potential recovery in private class actions which that Court categorized as "misleading," should not the Western District of Pennsylvania have the power to oversee these same counsel's representations to the potential members of the alleged *Rodgers* class at the Homestead Works? The members of the alleged *Rodgers* class may not be as discerning as the Fifth Circuit in determining the facts which these counsel omit.

D. The Facts Of This Case Do Not Provide A Basis For Denial Of The Petition Because (i) The District Court Did Not Act Unfairly To Plaintiffs, And (ii) The Third Circuit's Holding Was Not Dependent Upon The Facts Of This Case.

There are numerous representations of fact in the "Brief In Opposition To Certiorari" which might be misleading to this Court. Plaintiffs suggest that the Defendants in this case have been free to communicate with potential class members and have solicited releases of class members' claims pursuant to the Consent Decrees, while Plaintiffs were precluded from all communications. Brief Opp. Cert. at 19. Nothing could be further from the truth. As discussed in the Petition at 7-8, in response to a motion by these Plaintiffs invoking Local Rule 34(d), the Defendants agreed to submit to the Plaintiffs and the Western District of Pennsylvania communications to be made pursuant to the Consent Decrees, before those communications were made to members of the alleged *Rodgers* class. Accordingly, not only

the Northern District of Alabama, but the Western District of Pennsylvania and counsel for these Plaintiffs have reviewed notices required by the Consent Decrees to be sent to potential members of the alleged class in this case. Further, Plaintiffs are well aware of Directive No. 4 of the Audit and Review Committee established under the Consent Decrees,[12] which prohibited the Implementation Committees created by the Decrees from discussing the subjects of back pay or releases under the Consent Decrees except to say that the individual amounts of back pay were in the process of being computed and that employees eligible to receive back pay would receive a separate notice, when the back pay is to be offered, which will provide all information necessary to enable employees to make an informed decision concerning its acceptance. Directive No. 4 prohibited the Implementation Committees from making any other statements regarding back pay or the releases.

Because of the prior pendency of the appeal to the Fifth Circuit, Defendant Company and Defendant Union to this date have neither made distribution of back pay under the Consent Decrees nor made available releases to back pay recipients. As discussed above, when those distributions of back pay are made, the Northern District of Alabama and the Western District of Pennsylvania will be exercising supervision over the communications to potential members of the alleged *Rodgers* class.

Plaintiffs give the impression that they were precluded for three years from communicating with poten-

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12. Plaintiffs included Directive No. 4 in "Appendix To Appellants' Brief" at 276aa, which was filed with the Third Circuit.

tial members of the alleged class. Brief Opp. Cert. at 1. However, Plaintiffs did not even seek permission to communicate with potential members of the alleged class until two years after the suit was filed. Brief Opp. Cert. at 4. Further, contrary to the impression one gets from reading Brief Opp. Cert. at 19-20, the District Court did not totally preclude all communications by Plaintiffs. When Plaintiffs sought the opportunity to communicate in September 1973, they claimed to need such communication for discovery purposes to determine from potential members of the alleged class the "seniority policies" and "testing policies" at the Homestead Works. Petition, App. D, at 38a. The District Court was properly doubtful as to Plaintiffs' intentions, since the Company had spent 2,000 hours searching out and copying the documents which explained those very practices and Plaintiffs had spent only two hours inspecting those documents. Petition, App. D, at 38a-40a. Nevertheless, the District Court did not foreclose the contacts by Plaintiffs with potential class members for discovery purposes. The District Court stated:

> "As to discussion with individual members of the class, if you will notify the defendants in advance whom you intend to contact in the class and what you intend to ask them, and what you think you can get from them, then I will permit you to contact them for the limited purposes that you have set forth, giving the right to the defendant to object to your contacting any particular member of the class, because it seems to me that this is absolutely going to be an exercise in futility when you go to an employee of the United States Steel Corporation and ask him what testing means were used in 1962. I can't conceive of him knowing, and I think it would be a waste of time." Petition, App. D, at 40a.

Strangely, Plaintiffs never specified any individual whom they wished to contact for discovery purposes, and never took advantage of the opportunity for a court order authorizing contact with particular class members.

Further, the District Court later ruled that when individual class members contacted Plaintiffs' counsel, said counsel could communicate with those potential class members, after an appropriate affidavit was filed verifying the absence of solicitation. Petition at 8-9.

Accordingly, Local Rule 34(d) was not an absolute bar to communication with potential members of the alleged Plaintiff class, contrary to Plaintiffs' representation of the facts.

Even more importantly, the Third Circuit's holding was not a ruling upon the District Court's application of Local Rule 34(d) to these parties or the District Court's exercise of discretion under that Rule. The Third Circuit's opinion was not dependent upon the wisdom of the particular rulings of the District Court, but instead invalidated the entire Local Rule. The Third Circuit has not only prohibited any further application of Local Rule 34(d) in this case, but has held that district courts lack the statutory power to promulgate rules supervising communications by counsel with potential members of their alleged class, at least prior to certification of the suit as a class action.[13]

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13. The Brief Opp. Cert. at 20-21 suggests that the majority opinion was limited to the particular language of Local Rule 34. However, that opinion makes clear that its holding of a lack of statutory power included even Suggested Local Rule No. 7 in the MANUAL FOR COMPLEX

Conclusion

Accordingly, the arguments set forth in Plaintiffs' "Brief In Opposition To Certiorari" do not provide a basis for denial of the Petition. This case is an important one. The Third Circuit's decision affects all class action litigants. For the reasons set forth in the Petition and in this Memorandum, we request that the Court grant the Petition for Writ of Certiorari.

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Dated: September 23, 1975

LITIGATION, which Plaintiffs characterize (Brief Opp. Cert. at 20) as less "restrictive" than Local Rule 34(d). The majority opinion stated that the draftsmen of Suggested Local Rule No. 7 had "no power to enlarge the statutory rule making authority of the district courts." Petition, App. A, at 27a. The majority avoided ruling (Petition, App. A at 22a, 28a n. 18) upon the possible constitutional overbreadth issues presented by a comparison of Local Rule 34(d) and Suggested Local Rule No. 7—issues which are still open because the majority opinion does not explicitly prohibit adoption of such rules regarding the post-certification stage.